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16 August 1988
OCA 2771-88

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MEMORANDUM FOR: C/L&PD/OGC
PMS/OL (Attn: [redacted])

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FROM: [redacted] Legislation Division
Office of Congressional Affairs

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SUBJECT: Defense Consultant Reform Act of 1988,
H.R. 5016 and Registration of Consultants
Amendment to Senate DOD Appropriations Bill,
H.R. 4781

1. By memorandum dated 8 August 1988, [redacted] pointed out several problems with H.R. 5016, the Defense Consultant Reform Act of 1988. These concerns relate to information required when consultants register with the Department of Defense. Senator Pryor later introduced a similar amendment to the Department of Defense Authorization Bill, which was passed. Attached are copies of H.R. 5016 and the Pryor amendment. I have drafted the following language for the House bill to protect the Agency's interests:

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H.R. 5016

(h) NONDISCLOSURE OF CLASSIFIED INFORMATION. -- This section shall not apply to the disclosure of information concerning a contract, including the parties, when either the subject matter of the contract, or the fact of the contractual relationship between the consultant and any other person for whom he performs consulting services, is classified pursuant to Executive Order 12356 and its successor orders or is otherwise protected from unauthorized disclosure by statute.

2. Section (f)(1) of the amendment to H.R. 4781 contains an exception for a contract which involves "sensitive foreign intelligence or foreign counterintelligence activities." Please advise me as to whether this exception is adequate and, if so, whether it should be used in lieu of the draft language provided above. You may contact me on [redacted] with your comments.

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Attachments [redacted]

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SUBJECT: Memo for C/L&PLD/OGC and PMS/OL (Attn. [redacted] re
Defense Consultant Reform Act of 1988, H.R. 5016 and
Registration of Consultants Amendment to Senate DoD
Appropriations Bill, H.R. 4781

OCA/RMH:bsb [redacted] 16 Aug 88

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100TH CONGRESS
2D SESSION

H. R. 5016

To regulate the use and obligations of consultants in the Department of Defense
and in defense contracting.

IN THE HOUSE OF REPRESENTATIVES

JULY 12, 1988

Mr. BENNETT introduced the following bill; which was referred to the Committee
on Armed Services

A BILL

To regulate the use and obligations of consultants in the
Department of Defense and in defense contracting.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Defense Consultant
5 Reform Act of 1988".

6 **SEC. 2. REGULATION AND CONFLICTS-OF-INTEREST OF**
7 **CONSULTANTS.**

8 At the end of chapter 141 of title 10, United States
9 Code, insert the following new section:

August 11, 1988

CONGRESSIONAL RECORD — SENATE

811557

get a procurement service agreement ought to be subject to this? I do not know. But this does not.

The momentum in the country comes from the revulsion of the country with what happened when the industrial consultants bribed some employees of the Federal Government.

So now we have something that is going to be a restriction upon the Department of Defense in procuring consultant and advisory services.

My staff advises me again that I should use the word "allegedly." Allegedly all those things took place. I personally visited with the U.S. Attorney. Where there is that much smoke, there has to be a hell of a fire.

Mr. PRYOR addressed the Chair.
The PRESIDING OFFICER. The Senator from Arkansas.

Mr. PRYOR. Mr. President, I will take only a very short period to respond because I know the Senator from Alaska has brought up a very good point about who might be covered under the amendment about to be offered.

Mr. President, January 4, 1988, the Office of Management and Budget published to all the heads of executive departments and establishments, including the Department of Defense, the new one definitive, final definition of consultants and consulting services. Four broad categories.

Mr. President, under these four broad categories are the exact same categories I listed from the OMB 120 circular, dated January 4, 1988, and incorporated on page 6 in this bill. So the definition of consultants totally correspond and corresponds directly with the definition of this Government, the Executive Office of the President, OMB.

Finally, Mr. President, let me also ask unanimous consent that Senator GRASSLEY of Iowa and Senator BINGAMAN of New Mexico be added on as original cosponsors of the amendment. I am just about to send the amendment to the desk in a few moments.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 2851

(Purpose: To establish certain Department of Defense contracting prohibitions and requirements relating to the registration of consultants)

Mr. PRYOR. Mr. President, I send on behalf of Senator LEVIN, Senator CONRAD, Senator GORE, Senator GRASSLEY, and Senator BINGAMAN an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Arkansas (Mr. PRYOR) for himself, Mr. LEVIN, Mr. CONRAD, Mr. GORE, Mr. GRASSLEY, and Mr. BINGAMAN, proposes an amendment numbered 2851.

Mr. PRYOR. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 114, below line 22, add the following:

SEC. 8127. (a)(1) Chapter 141 of title 10, United States Code, is amended by inserting after section 2397c the following new section:

"§ 2397d. Registration of consultants

"(a)(1) An agency may not award a contract for the procurement of advisory and assistance services to a consultant unless—

"(A) such consultant complies with the registration requirements of this section; and

"(B) the contracting officer responsible for such contract has reviewed the information provided by such consultant in its registration and such other information as may be available to the contracting officer and determined, with the approval of his supervisor, that, with respect to such contract, the consultant does not have a conflict of interest that could be prejudicial to the interests of the United States.

"(2) An agency may not award a contract to any person submitting a bid or proposal to such agency unless such person certifies that, to the best of such person's knowledge and belief, each consultant that has furnished advice, information, direction, or assistance to such person in support of the preparation or submission of the bid or proposal has complied with the registration requirements of this section.

"(b)(1) A consultant submitting a bid or proposal for a contract referred to in subsection (a)(1) shall, within such time after submitting the bid or proposal as the Secretary of Defense shall prescribe in regulations, register with the Office of Standards of Conduct of the Department of Defense and provide a copy of such registration to the contracting officer responsible for such contract.

"(2) A consultant retained by a person in connection with the preparation or submission of a bid or proposal for a Department of Defense contract shall register with the Office of Standards of Conduct of the Department of Defense within such time after the retention of such consultant as the Secretary of Defense shall prescribe in regulations.

"(3) A consultant who is registered with the Office of Standards of Conduct under this subsection with respect to one contract, bid, or proposal shall update the registered information whenever the consultant submits a bid or proposal for another Department of Defense contract (if such contract is for the procurement of advisory and assistance services) and whenever the consultant is retained by a person in connection with the preparation or submission of a bid or proposal for another Department of Defense contract. The consultant shall update such information within such time as the Secretary of Defense shall prescribe in regulations.

"(c) A person registering as a consultant under this section shall include in its registration the following information:

"(1) The name and address of the consultant.

"(2) A description of the nature of the services furnished by the consultant in the normal course of the consultant's business and a description of the nature of the clients (public and private, foreign and domestic) for which the consultant has furnished such services.

"(3) A list of all clients for which the consultant has furnished related advisory and assistance services within three years before the date of the registration and a descrip-

tion of the related advisory and assistance services furnished each such client by the consultant.

"(4) A statement of whether the consultant has ever been convicted of a felony and whether, at the time of the registration, there is pending any indictment or information charging the consultant with a felony.

"(5) A statement of whether, at the time of the registration, the consultant is ineligible, by reason of suspension or debarment, to be awarded a contract by the Federal Government.

"(6) A certification that, to the best of the consultant's knowledge and belief at the time of the registration, such consultant and all employees of the consultant are not in violation of any applicable requirement set out in, and are not engaged in any conduct prohibited by, sections 2397, 2397a, 2397b, and 2397c of this title and any contract term required by such section 2397c.

"(d) The Inspector General of the Department of Defense shall monitor the compliance of consultants with the registration requirements of this section and shall submit to the Committees on Armed Services of the Senate and the House of Representatives an annual report containing a discussion of the extent of such compliance.

"(e) Each consultant who intentionally fails to comply with the registration requirements of this section shall be subject to suspension and debarment proceedings.

"(f) This section shall not apply to a contract for advisory and assistance services which, as determined by the Secretary of Defense, involves—

"(1) sensitive foreign intelligence or foreign counterintelligence activities; or

"(2) sensitive law enforcement investigations.

"(g) In this section:

"(1) The term 'agency' means those agencies listed in paragraphs (1), (2), (3), and (4) of section 2303(a) of this title.

"(2) The term 'consultant' means any person (including, in the case of a business organization, any affiliate of such organization) that—

"(A) furnishes or offers to furnish advisory and assistance services; or

"(B) pursuant to a contract, furnishes advice, information, direction, or assistance to any other person in support of the preparation or submission of a bid or proposal for a Department of Defense contract by such other person.

"(3)(A) The term 'advisory and assistance services' means those services acquired by an agency from any nongovernmental source, by contract, to support or improve agency policy development, decisionmaking, management, and administration, or to support or improve the operation of management systems.

"(B) Such term includes—

"(i) management and professional services;

"(ii) the conduct and preparation of studies, analyses, and evaluations; and

"(iii) engineering and technical services.

"(4) The term 'management and professional services' means professional services relating to the management and control of programs, including—

(A) management data collection services;

(B) policy review and development services;

(C) program evaluation services;

(D) program management support services;

(E) program review and development services;

(F) systems engineering services; and

(3) other management and professional services of a similar nature which are not related to any specific program.

(5) The term 'studies, analyses, and evaluations' includes the following:

(A) Any analysis or other examination of a subject which—

(i) is undertaken to provide greater understanding of relevant issues and alternatives regarding organizations, policies, procedures, systems, programs, and resources; and

(ii) leads to conclusions or recommendations with respect to planning, programming, budgeting, decisionmaking, or policy development.

(B) With respect to a program of an agency, any study initiated by or for the program management office of the agency.

(C) A cost-benefit analysis, a data analysis (other than a scientific analysis), an economic study or analysis, an environmental assessment or impact study, a legal or litigation study, a legislative study, a regulatory study, a socioeconomic study, and a feasibility study which does not relate to construction.

(D) A geological study, a natural resource study, a scientific data study, a soil study, a water quality study, a wildlife study, and a general health study.

(E) Any similar study or analysis.

(6) The term 'engineering and technical services' means the furnishing of advice, training, or direct assistance to personnel in order to ensure the efficient and effective operation or maintenance of existing platforms, weapon systems, related systems, and associated software by such personnel.

(7) The term 'related advisory and assistance services' means advisory and assistance services provided to any person or to the Department of Defense regarding a contract, subcontract, or prospective contract or subcontract awarded or to be awarded by the Department of Defense."

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2397c the following:

"2397d. Registration of consultants."

(b) The first report required by section 2397d(d) of title 10, United States Code, as added by subsection (a), shall be submitted not later than one year after the date of the enactment of this Act.

Mr. PRYOR. Mr. President, let me also inform my colleagues that the two provisions advocated by Senator WARNER of Virginia are included in the original amendment. Therefore, I think this would preclude any necessity of having to have a second-degree amendment.

Mr. GRASSLEY. Mr. President, I rise in support of the amendment offered by Senators PRYOR, LEVIN, and CONRAD.

We are all too familiar with the revelations that have surfaced during the past several months about the abuses in the defense procurement process.

Many of those abuses have centered around the practices of consultants.

Too frequently we have heard the refrain that all consultants and contractors pass inside information and that everyone is doing it.

And we have heard from the Defense Department that they have no control over consultants or their activities.

Mr. President, we need to send a signal that this type of activity will not be tolerated.

That it will no longer be business as usual.

This amendment is a positive step in that direction.

The effect of this amendment will be to require that the dealings of consultants must be made public, their activities past and present will be on record, and that the public will know who is doing what.

My distinguished colleague Senator PRYOR has held two hearings in his Subcommittee on Federal Services that highlighted the problem.

The Judiciary Subcommittee of which I am the ranking member has also held hearings on the problem of consultants peddling insider information, and revealed what a widespread practice this has become.

But this is not new as I uncovered the problem back in 1985 in hearings before my Judiciary Subcommittee.

The scope of the problem is immense and has gotten worse.

It is unconscionable that anyone would claim that this amendment would place an administrative burden on the Department of Defense when the current practice of insider trading of information places such a severe and detrimental burden on the procurement process.

We require lobbyists to register, why are we unreasonable in requiring the same type of disclosure by defense consultants.

To say we do not need this type of information is to say we do not need the information required by the Truth and Negotiations Act.

It is time that we exerted some control over this practice and put an end to the business as usual mentality in the procurement process.

This amendment is a positive step in the right direction.

I commend the efforts of Senator PRYOR in proposing this amendment.

And I urge my colleagues to support it.

Mr. HEINZ. Mr. President, I join with the Senator from Arkansas in urging the Senate to take steps, now, to enact a registration requirement for defense consultants. By and large, those consultants employed by the Department of Defense are law-abiding and provide genuine assistance of great value to our security. I know of several such firms, particularly in the engineering field, in my own State. Let me emphasize that they and others have nothing to fear from this amendment, indeed, they may benefit from it. The purpose of the amendment is not to penalize consultants, but to protect the honest businessman, the taxpayer, and our national security from those who would make a fast buck on the backs of American servicemen and women.

The amendment of the Senator from Arkansas requires only that consultants provide the most basic informa-

tion about their services and their business to the Department of Defense. The amendment would not only require registration of those consultants who are themselves defense contractors, but also those who prepare bids and solicitations. In this way, the Department of Defense, its inspector general, and the public may know with whom we are dealing.

Mr. President, we are all aware of the circumstances which make this legislation necessary. There are those who were all too willing to use their consulting firms as a front—in order to cover the tracks which illegal activities might leave behind. Because they did not themselves hold a contract, but instead acted as a surrogate for those who did, they could not be monitored, and—for a time—were answerable to no one. Senator PRYOR has moved against just this kind of activity; the amendment we propose would uncover those tracks, and put a little sunshine in an area of Government that has been too long in the dark.

Some may say that we should not attach this legislation to the DOD appropriations—that it is legislation on appropriation. Given that much of the Defense authorization may ultimately prove to be a part of this bill, that argument holds far less weight. Moreover, we need to look at what the amendment does. It requires consultants to register their name and their address; a description of the services provided by the consultant; a list of clients; a statement of whether the consultant has ever been convicted of a felony; a statement of whether, at the time of registration, there is an indictment pending against the consultant; a statement of whether the consultant has been suspended or disbarred from Federal contracts. Mr. President—shouldn't we know all this?

So, the Senator from Arkansas has offered a solid amendment. In my view, it may not go far enough. I could support additional requirements for consultants representing foreign governments, and other limitations which—at the appropriate time—I may introduce in bill form. But there is no question that the amendment before us will help to reduce the likelihood of further procurement abuse, and will help us to put those who would sell out our security right where they belong: namely, behind bars.

I commend Senator PRYOR for his initiative, and I urge the adoption of the amendment.

Mr. BINGAMAN. Mr. President, I am pleased to join as a cosponsor of Senator PRYOR's amendment and I commend him for his long-time effort to deal with the issue of possible conflicts of interest among those who consult for the Defense Department.

Essentially what the Senator from Arkansas is trying to achieve is a much broader disclosure of such potential conflicts. And I strongly support such disclosure.